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February 12, 2025

STATE OF NEW JERSEY,	: SUPERIOR COURT OF NEW JERSEY
	: APPELLATE DIVISION
Plaintiff-Respondent,	: DOCKET NO. A-1342-24T5
	:
v.	: Criminal Action
	:
FRANK SAGGESE,	: ON APPEAL FROM A FINAL ORDER
	: DENYING POST-CONVICTION
Defendant-Appellant.	: RELIEF, SUPERIOR COURT OF
	NEW JERSEY, LAW DIVISION,
	PASSAIC COUNTY
	Ind. Nos. 17-04-00347-I, 17-07-00706- I, 17-06-00550-I, 17-06-00561-I
	Sat Below: Hon. Barbara J. Buono Stanton, J.S.C.

REDACTED BRIEF ON BEHALF OF DEFENDANT-APPELLANT

Defendant Is Confined

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[1] The petition for post-conviction relief is tantamount to a complaint and therefore is required to be included in the appendix pursuant to R. 2:6-1(1)(1).
[2] PCR counsel's brief is included in the appendix because it falls within one of the "exceptions to the general prohibition against including trial court briefs in the appendix." Specifically, issues raised in PCR counsel's brief were referred to in oral argument and the PCR court's opinion.

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

Defendant asserts that his attorney for his first PCR petition and subsequent hearing was ineffective because he failed to argue that trial counsel was ineffective when he allowed defendant to plead guilty. Defendant's guilty pleas to carjacking and kidnapping were not supported by the appropriate factual bases. That is, the carjacking plea fails because defendant did not, and legally could not, establish through his plea that the alleged victim of the carjacking was in control of the car in question. Furthermore, he could not plead guilty to the three counts of kidnapping because he did not have a specific purpose to facilitate the commission of a crime, to inflict bodily injury, or to terrorize anyone. Also, the kidnappings were incidental to the carjacking.

PROCEDURAL HISTORY

Defendant, Frank Saggese, was indicted on April 13, 2017, by the Passaic County grand jury, in Indictment 17-04-00347-I, for one count of third-degree burglary, in violation of N.J.S.A. 2C:18-2a(1). (Da17; Da38)[1]

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[1] "Da" refers to the appendix for defendant-appellant's brief.
1T refers to the plea transcript of June 4, 2018.
2T refers to the sentencing transcript of August 31, 2018.
3T refers to the sentence appeal transcript of March 14, 2019.
4T refers to the first PCR hearing transcript of September 22, 2021.
5T refers to the second PCR hearing transcript of October 30, 2024.

On June 8, 2017, the Passaic County grand jury indicted defendant, in Indictment 17-06-00550-I, with the following: second-degree kidnapping, in violation of N.J.S.A. 2C:13-1b(1) and or 2C:13-1b(2) (counts one, two, three); first-degree carjacking, in violation of N.J.S.A. 2C:15-2a(1) and/or 15-2a(2) (count four); second-degree robbery, in violation of N.J.S.A. 2C:15-1a(1) (count five); second-degree burglary, in violation of N.J.S.A. 2C:18-2a(1) (count six); third-degree aggravated assault, in violation of N.J.S.A. 2C:12-1b(7) (count seven); third-degree aggravated assault, in violation of N.J.S.A. 2C:12-1b(2) (count eight); fourth-degree credit card theft, in violation of N.J.S.A. 2C:21-6c(1) (counts nine, ten); third-degree endangering the welfare of a child, in violation of N.J.S.A. 2C:24-4a(2) (counts eleven, twelve, thirteen); third-degree theft, in violation of N.J.S.A. 2C:20-3a (count fourteen) and fourth-degree unlawful taking of means of conveyance, in violation of N.J.S.A. 2C:20-10b (count fifteen). (Da1-15; Da34)

On June 12, 2017, the Passaic County grand jury indicted defendant in Indictment 17-06-00561-I third-degree possession of a controlled dangerous substance (heroin), in violation of N.J.S.A. 2C:35-10a(1). (Da16; Da26)

On July 20, 2017, the Passaic County grand jury indicted defendant in Indictment 17-06-00706-I for third-degree possession of a controlled dangerous substance (heroin), in violation of N.J.S.A. 2C:35-10a(1). (Da18; Da30)

Defendant pled guilty on June 4, 2021, to three counts of second-degree kidnapping and one count of first-degree carjacking under Indictment 17-06-00550-I. He also pled guilty to: one count of third-degree possession of a controlled dangerous substance (heroin) under Indictment 17-06-00561-I; one count of third-degree possession of a controlled dangerous substance (heroin) under Indictment 17-07-00706-I; and one count of third-degree burglary under Indictment 17-04-0347-I. (1T45-3 to 46-1; Da19-25)

Defendant was sentenced by the Honorable Ernest M. Caposela, A.J.S.C. on August 31, 2018. He was sentenced to prison as follows: 16 years, 85% without parole for carjacking; ten years, 85% without parole for one count of second-degree kidnapping (the three kidnapping charges were merged for the purpose of sentencing); five years for third-degree burglary; and five years for third-degree possession of a controlled dangerous substance (heroin). All counts were ordered to run concurrently. (2T35-2 to 39-21; Da26-41)

Defendant filed a sentencing appeal which was denied on March 14, 2019 by the Appellate Division. (Da42) No petition for certification was filed with the Supreme Court.

Defendant filed his first petition for post-conviction relief on June 9, 2021, alleging ineffective assistance of counsel because of counsel's failure to provide the sentencing court with ---------- The

matter was heard by the Honorable Ronald B. Sokalski, J.S.C. (retired and temporarily assigned on recall) who denied the petition on September 22, 2021. (Da43)

Defendant appealed the matter to the Appellate Division which affirmed the denial of post-conviction relief on February 8, 2023. (Da44-46) The Supreme Court denied defendant's petition for certification on September 11, 2023. (Da47)

Defendant filed a timely second petition for post-conviction relief on November 22, 2023. (Da48-76)[2] Defendant filed a Reply in Further Support of Second Verified Petition for Post-Conviction Relief. (Da77-85) That petition was heard by the Honorable Barbara J. Stanton, J.S.C., on October 30, 2024. The court denied the petition by way of an order and an opinion dated November 21, 2024. (Da86-106)

Defendant filed an Amended Notice of Appeal on January 21, 2025. (Da107-110)

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[2] The PCR court found that the second petition was timely filed pursuant to R. 3:22-12(a)(2) as it was filed within one year after the date of the denial of the first application for PCR relief, and the requested relief deals with whether the first PCR counsel was ineffective. R. 3:22-12(a)(2)(C). The PCR court rejected the defense argument that R. 3:22-12(a)(2)(B) allowed the consideration of the second PCR petition. Thus, the PCR petition was denied solely upon the merits and not because of any jurisdictional defect.

STATEMENT OF FACTS

The police report regarding the alleged carjacking and kidnappings provided the following account of the owner of the vehicle who is the mother of the children who were in the car at the time of its taking by defendant:

> The victim informed the officer that her car had been taken and her children were in it. She then explained she had parked her Matrix near the Wendy's parking lot and proceeded to exit the car and walk to the ATM, which was located at the Passaic County Community College. Ms. Aquino explained that she left her three children behind in the vehicle secured, with its engine running. She continued to add that as she returned back to her car, she remotely unlocked the vehicle's door with her spare key and observed a light-skinned male. . . run into her car driver seat. Upon making that observation, Ms. Aquino ran to the vehicle and struck the driver side door in an attempt to prevent the male from driving away with the car. Ms. Aquino then hung onto the door—driver side door with—screaming, my kids, my kids. At that point in time the suspect struck the victim multiple times with his elbows and proceeded to driver drag her as she hung from the car. She then fell off onto the ground and the suspect drove away the vehicle and the children.
>
> (1T26-16 to 27-13)

In pleading guilty, defendant admitted that on December 2, 2016, he was in front of the Wendy's Restaurant at 145 Broadway, Paterson at about 9:20 a.m. Defendant noticed that a car, which he later learned was a Toyota, was in front of the Wendy's. (1T46-7 to 47-1)

Defendant admitted that he entered the Toyota, not knowing who the owner was and without permission. He entered the Toyota with the intent to

steal the car. He was able to get into the car because the driver's door was not locked. The engine was running. (1T47-2 to 25)

The Toyota's owner, whom defendant did not know at the time, approached the car while defendant was seated in it. The owner, Maya Aquino, tried to stop defendant from stealing the car by grabbing onto the door handle. Defendant agreed with the remark of the trial court that when Ms. Aquino put her hand on the door handle, defendant did not apologize to her, saying that this was a big mistake and that she could take her car back. (1T48-1 to 49-4). Instead, defendant drove the car away. Ms. Aquino had at one point her hand on the Toyota's window, and defendant intended to drive away notwithstanding who was coming. (1T49-5 to 20)

Defendant did not realize that there were three children in the Toyota until after he drove away. He did not immediately stop the car; rather, he drove around one mile across the river into Hawthorne where he could safely leave the Toyota at the Napa Auto Parts store. The children were left unharmed, and defendant never intended to harm them. (1T50-2 to 51-20)

LEGAL ARGUMENT

POINT I

THE ELEMENTS OF CARJACKING WERE NOT ESTABLISHED DURING THE PLEA COLLOQUY, AND FIRST PCR COUNSEL WAS INEFFECTIVE BY NOT RAISING THE ISSUE AT THE FIRST PCR HEARING (Da94-104)

The right to counsel includes "the right to the effective assistance of counsel." State v. Nash, 212 N.J. 518, 541 (2013), citing Strickland v. Washington, 466 U.S. 668 (1984). Strickland, which was adopted in New Jersey in State v. Fritz, 105 N.J. 42 (1987), set forth a two-prong test to determine whether a defendant has been deprived of effective assistance of counsel. Under the first prong of the test, a defendant must show that counsel's performance was deficient in that it "fell below an objective standard of reasonableness" and that "counsel made errors so serious that 'counsel' was not functioning as the counsel guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687-688. A defendant must show that counsel's actions were beyond the "wide range of professionally competent assistance." Id. at 690. The "quality of counsel's effectiveness" is based on the "totality of counsel's performance in the context of the State's evidence of defendant's guilt." State v. Marshall, 123 N.J. 1, 165 (1991). The standard for establishing that a defendant was denied the effective assistance of counsel is the same under both the federal and state constitutions. State v. O'Neal, 219 N.J. 598 (2000).

In order to show prejudice under the second prong, defendant must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A court focuses on the "fundamental fairness of the proceeding whose result is being challenged." Id. at 696. "If counsel's performance has been so deficient as to create reasonable probability that these deficiencies materially contribute to defendant's conviction, the constitutional right would have been violated." Fritz, 105 N.J. at 58.

Furthermore, to show prejudice in connection with a guilty plea, "a defendant must prove that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial." State v. Castagna, 187 N.J. 293, 351 (2006); State v. Antuna, 446 N.J. Super. 595, 600 (App. Div. 2016). See Hill v. Lockhart, 474 U.S. 52, 59 (1985) (In a challenge to a conviction resulting from a guilty plea, a defendant may argue that, "but for counsel's errors, he would not have pled guilty and would have insisted on going to trial.")

In determining whether a defendant has stated a prima facie claim for relief in a PCR hearing, the court must view the facts in the light most favorable to the defendant. State v. Preciose, 129 N.J. 451, 462-463 (1992); State v. Pratt,

316 N.J. Super. 46, 50-51 (App. Div. 1998), certif. denied, 158 N.J. 72 (1999). In addition, "a defendant must establish a prima facie case for relief, material issues of disputed fact, and show that an evidentiary hearing is necessary to resolve the claims. R. 3:22-10(b)." State v. O'Donnell, 435 N.J. Super. 351, 370 (App. Div. 2014). Defendant contends that upon reviewing the facts in the light most favorable to him, the court will conclude that defendant did in fact establish a prima facie case. Thus, this court should order a reversal and remand the matter back to the trial court for a trial. In the alternative, an evidentiary hearing is necessary to determine the effectiveness of first PCR counsel's representation. No evidentiary hearing was conducted in this matter.

This court exercises de novo review over the court's factual findings and legal conclusions because the PCR court conducted no evidentiary hearing, and thus made no credibility findings. State v. Harris, 181 N.J. 391, 420-421 (2004), cert. denied, 545 U.S. 1145 (2005) (internal citations omitted). "A trial court's interpretations of the law and the legal consequences that flow from established facts are not entitled to any special deference." Id. at 419 (citation omitted). Therefore, "resolution of the claim is based on objective evidence in the record, and not on any credibility determinations made by the PCR court." Id. See also State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (Appellate courts "review under the abuse of discretion standard the PCR court's determination to

proceed without an evidentiary hearing.").

In the instant matter, defendant was charged with carjacking. (Da4) When a defendant pleads guilty, he relinquishes the right to require that the State prove to the jury every element of the offense beyond a reasonable doubt. See State v. Medina, 147 N.J. 43, 48-49 (1996). When defendant retracted his not guilty plea to carjacking, he was required to acknowledge that he had committed all elements of carjacking to provide an adequate factual basis for his guilty plea. However, defendant did not do so, and PCR counsel at the first PCR hearing should have recognized this fact and raised it as an issue at the first PCR hearing. By failing to recognize that trial counsel was not functioning as counsel as guaranteed by the Sixth Amendment, PCR counsel for the defendant at the first PCR hearing likewise was not functioning as counsel as guaranteed by the Sixth Amendment. See Strickland, 466 U.S. at 687-688. Thus, reversal is mandated, and in the alternative, an evidentiary hearing is necessary to consider the effectiveness of counsel's representation.

Defendant was charged in Indictment 17-06-00550-I with a violation of the provisions of N.J.S.A. 2C:15-2a(1) and/or N.J.S.A. 2C:15-2a(2). (Da4) The Model Criminal Jury Instruction for carjacking (Da111-116) requires in part that the State, absent a guilty plea, would have had to prove that Ms. Aquino was in possession or control of her Toyota and that defendant purposely or knowingly

placed that person in control of the car (Ms. Aquino) in fear of immediate bodily injury, or that defendant knowingly inflicted bodily injury or used force against the person in possession or control of the car.[3] (emphasis added) (Da112)

Defendant did not acknowledge on the record that Ms. Aquino was in possession or control of the Toyota. In effect, he could not possibly have acknowledged that Ms. Aquino was in control or possession of the car because she was neither in possession nor in control of the Toyota. She had left her car unattended to go to the ATM, thereby forfeiting possession or control over the car at the time defendant approached her Toyota. As she was approaching the Toyota, she unlocked the doors, thereby allowing defendant to enter the vehicle.

In any event, assuming arguendo that Ms. Aquino was in fact in possession or control of the Toyota, defendant was required to acknowledge such on the record, but did not do so. "Simply put, a defendant must acknowledge facts that constitute the essential elements of the crime." State v. Gregory, 220 N.J. 413, 420 (2015), citing State v. Sainz, 107 N.J. 283, 293 (1987). It cannot be presumed from defendant's elocution on the record that he was acknowledging the essential element that Ms. Aquino was in possession or in control of the car. He had to specifically enunciate the element. "[A] court is not permitted to

[3] Defendant submits that sections c and d listed on Da112 are not applicable here.

presume facts required to establish 'the essential elements of the crime.'" Id. at 421. "The trial court's task is to ensure that the defendant has articulated a factual basis for each element of the offense to which he pleads guilty." Id. at 421-422, citing State v. Campfield, 213 N.J. 218, 232 (2013). This was not accomplished by the trial court, and PCR counsel at the first hearing, should have observed such and raised the issue before the first PCR court.

Defendant submits that State v. Jenkins, 321 N.J. Super. 124, 131-132 (App. Div.), certif. denied 162 N.J. 197 (1999), supports his position that the denial of PCR relief should be reversed. In Jenkins, the Appellate Division ruled that subsection (2) of the carjacking statute requires that the "occupant or person in control" of the vehicle was placed within a heightened zone of danger with relationship to the subject vehicle. "Such proof is necessary to sustain a carjacking conviction under that subsection. . . ." Furthermore, the court ruled "that the statutory reference within subsection (2) to 'in control of' cannot be satisfied by proof of constructive possession of the car. A contrary conclusion would give the statute a far broader sweep than was intended." Ibid. Ms. Aquino did not have possession of the car when she left it unattended, and she surely was not in control of it when defendant proceeded to drive away. Attempting to regain control is not tantamount to having control over the vehicle.

Thus, the failure of the trial court to require full acknowledgement of all the elements of the offense of carjacking—an impossibility considering the factual scenario leading to the taking of the car—requires reversal and a new trial. In the alternative, a remand should be ordered to provide for an evidentiary hearing to determine the effectiveness of the first PCR counsel who failed to raise the issue regarding the elements of carjacking.

The second prong of Strickland and Fritz both require a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In regards to a plea, it must be demonstrated that the defendant would not have pled guilty and would have insisted on going to trial. It is readily apparent that defendant was reluctant to plead guilty at first and was desiring a trial. According to his certification (Da48-51), he appeared in court to plead guilty to lesser crimes involving burglary and drug possession—offenses which had nothing to do with the carjacking and kidnapping charges. (Da49) He complained of not receiving a copy of the indictment, grand jury minutes, or discovery. (1T4-7 to 11) He also said he was missing a lot of the police reports. (1T20-1 to 6) In fact, defendant had rejected all plea offers which had been offered prior to the day he pled guilty. (1T34-24 to 35-1) He told the trial court that the charges were higher than they should be and that they should only be theft by unlawful taking—that no robbery

had occurred regarding credit cards.[4] (1T35-17 to 36-4; Da49-50; Da65) Regarding carjacking, defendant said that he countered an offer with a suggestion of ten years of incarceration "and that was just to get the case out of the way because he did not want to fight it." (1T37-11 to 18) According to the prosecutor, defendant was offered a term of 18 years, but defendant rejected the offer the next day. She said that defendant at the last few court appearances did not want to take anything. (1T39-4 to 14) Thus, it is apparent that defendant would not have pled guilty and would have insisted on going to trial but for the errors of his trial lawyer. Thus, viewing the facts in the light most favorable to defendant, Preciose, it is apparent that both Strickland prongs were satisfied, and the denial of PCR relief should be reversed.

Defendant disagrees with the second PCR court's analysis regarding carjacking. The court cites the plea colloquy as establishing "the close proximity of the victim to the car, as she had her hand on the vehicle trying to stop the petitioner." (Da100) "Close proximity" does not establish control. Assuming that Ms. Aquino did try to stop defendant from stealing her Toyota, that in and of itself does not establish control of the car. Rather, the plain reading of the colloquy establishes the opposite—that she did not have control of the

[4] Indictment 17-06-00550-I had a count of credit card theft which was dismissed as part of the plea bargain. (Da1; Da21)

car. She had left the vehicle and walked an unspecified distance to go to the ATM. She was on her way back to the car when defendant entered it—again no distance was established as to how far away from her vehicle she was when she unlocked the car. One can only assume that she was some distance away from the Toyota since defendant had sufficient time to enter it while she was returning to the car. The fact that Ms. Aquino, according to the plea colloquy, had to place her hand on the car handle in her attempt to reclaim the car demonstrates a lack of control over the car. (1T48-1 to 49-20) Furthermore, the court's reliance on the unpublished Bryant opinion (Da100) is misplaced and should not have been considered by the PCR court. R.1:36-3 specifically prohibits the citing of an unpublished opinion by any court except in certain delineated situations, none of which are applicable here.

Thus, viewing the facts in the light most favorable to defendant, trial counsel and the first PCR counsel were both ineffective. Defendant prays that this court reverse the second PCR court and remand the matter for a new trial. In the alternative, defendant requests that an evidentiary hearing should have been ordered to examine the issue of ineffective assistance of counsel.

POINT II

THE ELEMENTS OF KIDNAPPING WERE NOT ESTABLISHED DURING THE PLEA COLLOQUY, THE KIDNAPPING CHARGES WERE INCIDENTAL TO THE CARJACKING CHARGE, AND FIRST PCR COUNSEL WAS INEFFECTIVE BY NOT RAISING THE ISSUES AT THE FIRST PCR HEARING (Da94-104)

Defendant submits that he did not admit to the kidnapping counts during his plea colloquy as required and that the kidnapping charges were incidental to the carjacking charge. Trial counsel was ineffective for allowing defendant to plead guilty to kidnapping when defendant did not acknowledge his guilt, and for allowing defendant to plead guilty to kidnapping when the charges were incidental to the carjacking charge. First PCR counsel's representation was ineffective because he failed to recognize trial counsel's ineffectiveness when he neglected to raise the issues at the first PCR hearing. That is, PCR counsel was not functioning as competent counsel as guaranteed by the Sixth Amendment and Article I, section 10 of the New Jersey Constitution. See Strickland, 466 U.S. at 687-688. Thus, defendant did present a prima facie case before the second PCR court. The denial of PCR relief should be reversed, or in the alternative, a remand is required for the purpose of holding an evidentiary hearing.

As stated by defendant in his certification and as reflected by the record, he did not intentionally "kidnap" the children because he had no idea that they

were even in the car. When he saw the children, he was shocked, and he panicked. He did not know the children were in his car when he stole the car. He parked the car in a safe place and left the children unharmed about a mile from where he took the car. (1T49-23 to 51-20)

In order to commit kidnapping, the unlawful removal or confinement must have been with a specified purpose. See N.J.S.A. 2C:2-2(b)(1) and Model Criminal Jury Instruction for kidnapping (Da119): ". . .to constitute kidnapping, an unlawful removal or confinement must have been with a specified purpose.") Defendant needed to place on the record when he pled guilty to the three counts of kidnapping that it was his conscious object to engage in conduct of that nature (kidnapping) or to cause such a result. That was not accomplished when defendant pled guilty. Defendant did not know that there were children in the Toyota, and when he did observe them, he stopped the car in a safe place, the Napa Auto Parts parking lot. Thus, he did not have the required "purposeful" intent required to satisfy a plea to the kidnapping counts, and his plea of guilty was deficient because of the lack of a "purposeful" intent.

Non-ransom kidnapping necessarily involves the purpose to commit another unlawful act. See State v. Brent, 137 N.J. 107 (1994). If this matter had gone to trial, the State would have had to establish, based on the indictment, that defendant was facilitating any crime or flight thereafter, or that he intended to

inflict bodily injury on or to terrorize the victim. N.J.S.A. 2C:13-1b (1) or (2) (Da1-3) Defendant's plea did not acknowledge all of the elements of N.J.S.A. 2C:13-1b(2) because he clearly stated on the record that he never intended to harm the children. (1T51-14 to 20) Likewise, b(1) was not established during the plea colloquy because he did not take the Toyota to facilitate the commission of any crime. This surely does not constitute a scenario analogous to that in State v. Ellis, 20 N.J. Super. 533, 551 (App. Div. 1995) where the defendant abducted a woman in New York but committed kidnapping only when he confined her so that he could sexually assault her after entering New Jersey. Defendant here needed to enunciate, in order to satisfy b(1), that the taking of the Toyota was meant to facilitate another crime. That did not and could not happen. Rather, the kidnappings were incidental to the carjacking, and defendant could not have been expected to plead guilty to the kidnapping offenses.

> A kidnapping is criminal conduct that is "not ordinarily inherent in the underlying criminal conduct itself" or "merely incidental to the underlying crimes."
>
> [State v. Cruz-Pena, 243 N.J. 342, 356 (2020), citing State v. LaFrance, 117 N.J. 583, 589-590 (1990)]

The kidnapping of the three children and the carjacking were part and parcel of each other. The alleged kidnappings were part and parcel of the theft of the Toyota and cannot be separated from the carjacking.

Defendant submits that the second PCR court's analysis of the propriety of defendant's guilty pleas to the three kidnapping charges is faulty. The court focused on whether the asportation of the three children in the Toyota constituted a substantial distance. No discussion in the court's written opinion involved whether the kidnapping counts were incidental to the carjacking count. There was no discussion as to whether defendant had the necessary specific intent to commit kidnapping.

Furthermore, the court explained that defendant's claim of ineffective assistance of counsel regarding "pleading guilty to the kidnapping statute would have made no different outcome to the case." (Da104) Defendant disagrees. Defendant could not legitimately plead guilty to an offense where he could not acknowledge on the record all elements of the offense of kidnapping. Should this court not remand and order a new trial, a court could find at a later date at an evidentiary hearing that trial counsel and first PCR counsel had been ineffective, thereby rendering the plea of guilty null and void. Defendant would have wanted to go to trial had it not been for counsel's unprofessional errors because he had originally insisted that he had only been guilty of stealing the car and that he had been overcharged. (1T35-22 to 25) Thus, the second prong of the Strickland test would have been satisfied because the outcome of this matter would have been different.

Accordingly, defendant requests that the denial of PCR relief be reversed for a new trial. In the alternative, defendant requests a remand so that an evidentiary hearing can be held.

POINT III

DEFENDANT'S SECOND PCR PETITION IS NOT PROCEDURALLY BARRED BY R. 3:22-4 (Da105)

Defendant submits this petition may be considered by the court and was not barred by R. 3:22-4. The second PCR court recognized that R. 3:22-4 was not a bar for considering defendant's second PCR petition. Defendant, through no fault of his own, was the victim of ineffective assistance of counsel by his trial counsel who allowed him to plead to counts to which defendant could not plead guilty and by his first PCR counsel who failed to raise the issues which were subsequently raised in his second PCR brief and at the hearing before the Law Division. A defendant's ineffective assistance of counsel claims against PCR counsel ordinarily should be raised in a second or subsequent petition. See State v. Vanness, 474 N.J. Super. 609, 627 (App. Div. 2023).

In State v. Harris, 181 N.J. at 518, the Supreme Court cited State v. Moore, 273 N.J. Super. 118, 125 (App. Div.), certif. denied, 137 N.J. 311 (1994) for the following:

> Consequently, ineffective assistance of counsel claims. . .are congruous with the exceptions to the procedural bar of R. 3:22-4 because they (1) implicate issues that could not have been

> reasonably raised in prior proceedings; (2) involve infringement of constitutional rights; or (3) present exceptional circumstances involving a showing of fundamental injustice. See State v. Mitchell, 126 N.J. 565, 584, 601 A.2d 198 (1992).

Defendant submits that he could not have raised the issues previously, his constitutional rights were infringed, and that the present circumstances involved a showing of fundamental injustice. In challenging his legal representation, defendant is asserting that his rights to effective assistance of counsel invoke constitutional protections provided by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the New Jersey Constitution. He further asserts similarly that the issues raised could not have been raised previously because he was a lay person depending on his attorneys to steer him properly through the legal process, and they failed to do so based on the arguments raised in the instant brief. (5T8-3 to 21) Finally, it would be a fundamental injustice to deny defendant relief when he was the victim of ineffective representation. He was represented by counsel, and he was allowed to plead guilty to offenses where there could be no factual basis, and in any event, defendant did not supply the factual bases required to establish proper guilty pleas.

In State v. Wildgoose, 479 N.J. Super. 331 (App. Div. 2024), the court discussed fundamental fairness. In considering State v. Martini, 187 N.J. 469 (2006), the court stated that there is no bright-line test to determine when a PCR

court should apply the fundamental fairness exception. However, this court did note that in defining fundamental injustice, the courts will look to whether the judicial system has provided the defendant with fair proceeding leading to a just outcome. Id. at 346. Furthermore, this court deemed it particularly instructive that the Martini court added "we generally have declined to read the exceptions to Rule 3:22-4 narrowly." Id. at 346, citing Martini and quoting Preciose, 129 N.J. at 476.

Accordingly, the fundamental fairness exception is applicable here. A just outcome did not occur here where defendant was allowed to plead guilty to offenses he could not have legally committed, where insufficient factual bases allowed for defendant to be convicted, and where the kidnapping charges were incidental to the carjacking charge.

CONCLUSION

For the foregoing reasons, defendant submits that the court should reverse the denial of PCR relief and remand the matter back to the Law Division for a trial. In the alternative, defendant asks that this matter be remanded for an evidentiary hearing.

Respectfully submitted,

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s/Steven E. Braun
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Dated: February 12, 2025

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PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S BRIEF

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent)
v. Frank Saggese (Defendant-Appellant)
Docket No. A-01342-24T5

Criminal Action: On Appeal from a Denial of Post-Conviction Relief Entered by the Superior Court of New Jersey, Law Division, Passaic County

Sat Below: Hon. Barbara Buono Stanton, J.S.C.

Honorable Judges:

Pursuant to R. 2:6-4, the State of New Jersey, through the Office of the Passaic County Prosecutor, respectfully submits the instant letter-brief in response to the Appeal of the Denial of Post-Conviction Relief Entered by the Superior Court of New Jersey, filed by Defendant-Appellant.

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PROCEDURAL HISTORY

On June 8, 2017, the Passaic County Grand Jury returned Indictment 17-06-0550-I, charging the defendant with three counts of second degree Kidnapping, pursuant to N.J.S.A. 2C:13- 1b; first degree Carjacking, pursuant to N.J.S.A. 2C:15-2; second degree Robbery, pursuant to N.J.S.A. 2C:15-1; second degree Burglary, pursuant to N.J.S.A. 2C:18-2a; third degree Aggravated Assault, pursuant to N.J.S.A. 2C:12-1b; fourth degree Credit Card Theft, pursuant to N.J.S.A. 2C:21-6c; three counts of third degree Endangering the Welfare of a Child, pursuant to N.J.S.A. 2C:24-4a; third degree Theft, pursuant to N.J.S.A. 2C:20-3a; and fourth degree Unlawful Taking of Means of Conveyance, pursuant to N.J.S.A. 2C:20-10b. Da1 to 15[1].

On June 4, 2018, related to the above indictment, the defendant entered a guilty plea to first degree Carjacking, pursuant to N.J.S.A. 2C:15-2; and three counts of second degree Kidnapping, pursuant to N.J.S.A.

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[1] "Da"- Defendant's Appendix;
"Db"- Defendant's Brief;
"1T" refers to the plea transcript of June 4, 2018;
"2T" refers to the sentencing transcript of August 31, 2018;
"3T" refers to the sentence appeal transcript of March 14, 2019;
"4T" refers to the first PCR hearing transcript of September 22, 2021;
"5T" refers to the second PCR hearing transcript of October 30, 2024.

2C:13- 1b. 1T46-4 to 51- 24. The defendant's guilty plea, after considerate negotiations, exposed him to a maximum of eighteen years New Jersey State Prison, subject to the No Early Release Act. 1T40:3-8.

On August 31, 2018, the defendant was sentenced on Count 4, first degree Carjacking, to sixteen years in New Jersey State Prison, of which the defendant would have to serve a minimum of eighty-five percent, pursuant to the No Early Release Act. Da34-37. The defendant would be placed on five years of parole supervision upon his release. Da34-37. On Count 1, second degree Kidnapping, the defendant was sentenced to ten years in New Jersey State Prison, of which the defendant would have to serve a minimum of eighty-five percent, pursuant to the No Early Release Act. Da34-37. The defendant would be placed on five years of parole supervision upon his release. Both Counts 2 and 3, which are second degree Kidnapping convictions, were merged into Count 1 and each other. Da34-37.

Defendant appealed his sentence, which was denied on March 14, 2019. Da42. Defendant did not petition for certification.

On September 22, 2021, the defendant's first petition for post conviction relief application ("PCR 1"), alleging ineffective assistance of trial counsel for failing to present mitigating information at sentencing, was

denied. Da43. That denial was affirmed by the Appellate Division on February 8, 2023. Da44-46. On September 11, 2023, the Supreme Court denied defendant's Petition for Certification. Da47.

Defendant's second petition for postconviction relief ("PCR 2"), alleging ineffective assistance of plea counsel for eliciting an insufficient factual basis, and ineffective assistance of PCR 1 counsel for not raising these issues, was filed on November 22, 2023. Da52. It was denied on October 30, 2024, and a written opinion was issued by the Honorable Barbara J. Buono Stanton on November 21, 2024. Da86-106.

In that opinion, the trial court found that despite the fact that the application may not have been timely, the court found that the Petitioner failed to establish a prima facie case that trial counsel was ineffective during the plea colloquy, the factual basis for all counts was sufficient, and Petitioner failed to establish a prima facie case that his PCR 1 counsel was ineffective for not raising these issues in his first PCR. Da86-106.

This appeal, filed February 12, 2025 alleges again that the Carjacking and Kidnapping elements were not met during the factual basis, and thus, this is the fault of plea counsel for not objecting, and "PCR 1" counsel for not raisingit. Dbi. He claims that they were therefore both ineffective. Dbi. He also claims that "PCR 2" was not barred pursuant to R. 3:22-4. Db20-22.

STATEMENT OF RELEVANT FACTS

After a substantial amount of negotiations, the defendant pled guilty following this exchange with the trial court:

THE COURT: All right. So if you get down to First-degree carjacking with a prior record, the range is, what 10 to 20.

THE DEFENDANT: Yes

THE COURT: With 85 percent before parole.

THE DEFENDANT: I countered with a 10, Your Honor, and that was just to get the case out of the way because I didn't want to fight it.

THE COURT: Well, but you can't counter the ten and say you didn't do anything.

THE DEFENDANT: No. It's not saying that I didn't do anything. I'm just saying that they didn't accept the counteroffer. I went even a little higher than that and they didn't accept that.

THE COURT: They said that you didn't even make one.

THE DEFENDANT: No. This - - all these offers were made. My first lawyer was Paul Chiaramonte, who did absolutely nothing for a year. I went and hired James Pomaco, which tried to negotiate with the Prosecutor's Office for over seven months. 1T37:11-25 – 38:1-6.

On December 2, 2016, the defendant was at the Wendy's Restaurant located at 145 Broadway in Paterson, New Jersey. 1T46:11 -16. While there, the defendant entered Maya Aquino's Toyota Matrix without her permission, while she was outside of it. His intent while entering the unlocked motor vehicle was to steal it. 1T46:20-25 to 1T47:1-25. The car

had been left running by Ms. Aquino. 1T47:22. Ms. Aquino tried to stop the defendant from stealing her car by grabbing on to the door window. 1T48:5-13. However, the defendant continued driving. 1T48:1-25 to 1T49:1-20.

In addition to stealing the motor vehicle, the defendant drove off with Ms. Aquino's three children in the backseat of the car. The children were between the ages of two and seven. 1T50:1-12. Despite becoming aware of the children in the backseat of the car, the defendant continued to drive away from Ms. Aquino. 1T50:17-25 to 1T51:1-10. The defendant stopped the car at Napa Auto Parts in Hawthorne where he let the children out of the car. 1T51:11-17. This distance was over a mile away. 1T50:24-25 to 1T51:1.

LEGAL ARGUMENT

POINT I:
THE PETITIONER'S SECOND POST CONVICTION RELEASE APPLICATION WAS BARRED.

The Petitioner's second post-conviction release application ("PCR 2") was filed untimely, and thus barred by Court Rule 3:22-12a(2). Even if the application was timely under Rule 3:22-12a(2), it must be dismissed, as his claims are barred pursuant to Rule 3:22-4. Therefore the State submits that this appeal should be denied.

A. Petitioner's application was untimely pursuant to Rule 3:22-12.

Petitioner's application to the trial court was untimely pursuant to the Court Rule. Rule 3:22-12 provides in pertinent part:

> 3:22-12. Limitations
>
> (a) General Time Limitations.
>
> (2) Second or Subsequent Petition for Post-Conviction Relief. Notwithstanding any other provision in this rule, no second or subsequent petition shall be filed more than one year after the latest of:
>
> (A) the date on which the constitutional right asserted was initially recognized by the United States Supreme Court or the Supreme Court of New Jersey, if that right has been newly recognized by either of those Courts and made retroactive by either of those Courts to cases on collateral review; or
>
> (B) the date on which the factual predicate for the relief sought was discovered, if that factual predicate could not have been discovered earlier through the exercise of reasonable diligence; or
>
> (C) the date of the denial of the first or subsequent application for post-conviction relief where ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief is being alleged.
>
> (c) These time limitations shall not be relaxed, except as provided herein.

Here, petitioner's first application for post-conviction relief, which did not address the issues contained in his second application, was denied on September 22, 2021.Da43. The Appellate Division affirmed the denial on February 8, 2023. Da44. However, the petitioner's second post-conviction application was not filed until November 22, 2023, 14 months late.

"PCR 2" does not allege a constitutional right newly recognized. R. 3:22-12a2(A). It also does not allege a factual predicate newly discovered. R. 3:22-12a2(B). Therefore it should have been filed within one year of the denial of "PCR 1" which would have been by September 22, 2022. In light of the untimeliness of "PCR 2," this appeal should be dismissed.

B. Petitioner's application is barred pursuant to Rule 3:22-4(b).

The Petitioner argues in "PCR 2" that his claim is not barred, because received ineffective assistance of counsel during his plea, as well as during "PCR 1." Db20. Petitioner further argues that the issues could not have been raised in prior applications, his constitutional rights were infringed upon, and he is a victim of fundamental injustice. Db21.

Neither the Petitioner's direct appeal, nor "PCR 1" raised a challenge to the factual basis for his guilty pleas to Carjacking and Kidnapping. Therefore, this challenge is barred from being considered in a subsequent application pursuant to Court Rule 3:22-4(b), which provides in pertinent part:

> (b) Second or Subsequent Petition for Post-Conviction Relief. A second or subsequent petition for post-conviction relief shall be dismissed unless:
> (1) it is timely under R. 3:22-12(a)(2); and
> (2) it alleges on its face either:
> . . .
> (B) that the factual predicate for the relief sought could not have been discovered earlier through the exercise of reasonable diligence, and the facts underlying the ground for relief, if proven and viewed in light of the evidence as a whole, would

> raise a reasonable probability that the relief sought would be granted; or
> (C) that the petition alleges a prima facie case of ineffective assistance of counsel that represented the defendant on the first or subsequent application for post-conviction relief.

Assuming *arguendo* that "PCR 2" was timely filed within the year allotted, the Petitioner's argument utilizes subsections (B) and (C) above. Db21. No new rule of constitutional law is offered by Petitioner. Db21. Other than pointing out that he himself is not an attorney, the petitioner provides no reasoning as to why the facts and circumstances supporting his claim surrounding his plea allocution could not have been discovered earlier.Db21.

Petitioner's claim that "PCR 1" counsel was ineffective is an attempt to have this court consider an argument that should have been raised on direct appeal. Rule 3:22-4. Petitioner argues that the factual bases to which he provided at his guilty pleas were insufficient, which is the fault of his plea counsel, and thus his "PCR 1" counsel for not catching it in his first application.Db15.

Petitioner's arguments are wholly misplaced. Petitioner's challenge to the factual basis should have been raised in his direct appeal, addressing the trial court's acceptance of the factual basis. Rule 3:21-4(a) "A petition pursuant to this rule is the exclusive means of challenging a judgment rendered upon conviction of a crime. It is not, however a substitute for appeal from conviction…" Rule 3:22-3.

Petitioner did not challenge his guilty plea at the trial level with a motion to

vacate, nor during his direct appeal. Therefore, it is barred and this appeal should be denied.

C. There is no fundamental injustice present here.

Petitioner claims that pursuant to State v. Harris, his claims meet the exception to the bar of Rule 3:22-4. Db20. He argues that the insufficiency of the factual bases could not have been raised earlier, but fails to provide why this argument was not made on direct appeal. Db21. He further argues that his constitutional rights were violated (no newly enacted right), and urges the court to grant a hearing based on the fundamental injustice exception. Db 21.

"A fundamental injustice occurs 'when the judicial system has denied a defendant with fair proceedings leading to a just outcome or when inadvertent errors mistakenly impacted a determination of guilt or otherwise wrought a miscarriage of justice.'" State v. Hannah, 248 N.J. 148, 178 (2021) citing State v. Nash, 212 N.J. at 547, 58 A.3d 705 (2013).

Although during "PCR 2" Petitioner asserted that he was not challenging the trial court's acceptance of his guilty pleas, he could not have, because it was barred at that point as well. Da94. The trial court properly analyzed whether or not the denial of a hearing on the issue would result in a fundamental injustice to the petitioner:

> Nothing in petitioner's certification indicates he was not aware of the degrees of crimes for which he plead guilty. Indeed, at the plea

> proceedings, the Prosecutor identified the degrees for each crime part of the plea agreement including first degree carjacking and three counts of second-degree kidnapping under Indictment 17-06-550. Tr. 45:1-11. Nowhere in defendant's certification does he claim he never received or read the Indictment. Nor, based on the arguments raised herein, has Petitioner filed a motion to withdraw his guilty plea under Slater, despite counsel's arguments that the plea came 'from informational sources outside the plea colloquy,' resulting in 'an apparent plea' to crimes 'he did not actually commit.' Brief at 14-15. Lastly, nowhere in defendant's certification does he state that the factual basis he provided at this plea colloquy was false. Da93.

The court provided a footnote:

> Despite this, and without more, he claims his trial lawyer at the trial judge's 'urging' pushed him into pleading guilty for crimes he did not commit. At oral argument, defense counsel argued that the trial judge should not have intervened during the plea colloquy and ask additional questions. Defense counsel relies on this argument to buttress his claim that trial counsel was ineffective as he should have objected to such questioning. This PCR motion is limited to petitioner's allegations of ineffective assistance of trial and first PCR counsel and reference to the trial judge by petitioner's counsel will be addressed only as it related to the performance, or lack thereof, by trial and/or PCR counsel. Notwithstanding, a trial judge is not prohibited from seeking clarification to ultimately find a defendant provided an adequate factual basis to accept a plea. Indeed, it is often necessary so to be satisfied that the factual basis satisfies the elements of the crimes for which the defendant is charged and pleading guilty to. As petitioner's counsel conceded at oral argument, any argument regarding the trial judge is not before this court. Da93-94, fn 3.

Petitioner accepted a favorable plea offer, was not coerced or forced to plead guilty, and has never sought to revoke his plea. He was fully involved and informed as to the ongoing plea negotiations. 1T38:9-25, 39:1-25, 40:1-8. At the time, he was extended term eligible and facing much more than the bargained for

sentence. 1T40:25, 41:1-23.

Petitioner also claims he is entitled to a hearing on this issue, but there is no question of fact here, the factual basis is reduced to a transcript. Additionally, there is no indication from the plea transcript or otherwise that Petitioner did not want to plead guilty. He wanted to negotiate the sentence. 1T38:9-25, 39:1-25, 40:1-8. Lastly, should plea counsel have objected to the factual basis at the time there are many remedial steps that could have been taken- additional questions asked, additional conference with counsel, or an adjournment to another date. Hence, there is no indication that he would not have pled guilty anyway.

Post conviction applications are "not, however a substitute for appeal from a conviction." Rule 3:22-3. Rather, he waived this issue, and is attempting to disguise an out of time direct appeal as a post conviction relief application for ineffective assistance of counsel. These claims are barred, there is no fundamental injustice present, and thus the appeal should be denied.

POINT II:
IN ANY EVENT, PETITIONER'S FACTUAL BASES WERE SUFFICIENT

Even if raised at the proper time, to the proper court, the Petitioner's claim that his factual bases were insufficient is without merit.

Although an appellate court may consider allegations of errors or omissions not brought to the trial judge's attention if it meets the plain error standard under Rule 2:10-2, the court frequently declines to consider issues that were not raised below

or not properly presented on appeal when the opportunity for presentation was available. Generally, unless an issue goes to the jurisdiction of the trial court or concerns matters of substantial public interest, the appellate court will ordinarily not consider it. J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021); State v. Jones, 232 N.J. 308, 321 (2018); State v. Lawless, 214 N.J. 594, 605 n.2 (2013); State v. Robinson, 200 N.J. 1, 20-22 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2022). See also, State v. Cabbell, 207 N.J. 311, 327 n.10 (2011) (Court declined to consider an argument first raised in a supplemental brief to the Court); Hirsch v. State Bd. of Med. Exam'rs, 128 N.J. 160, 161 (1992) (Court declined to address a claim presented after the Court granted a petition for certification).

The plain error standard applies under Rule 2:10-2 as to a challenge of the trial court's acceptance of a guilty plea. "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." Rule 2:10-2. Accordingly, a reviewing court may reverse on the basis of unchallenged error only if it finds plain error clearly capable of producing an unjust result.'" State v. Bunch, 180 N.J. 534, 541 (2004) (quoting, State v. Afanador, 151 N.J. 41, 54, 697 A.2d 529 (1997)).

In order for a court to accept a guilty plea, it must be satisfied that there is a factual basis for each element of the offense. State v. Campfield, 213 N.J. 218, 232, 61 A.3d 1258 (2013). The court must find that the defendant is guilty of the crime charged. Id. at 231. In reviewing a trial court's decision to accept a factual basis, an appellate court affirms if there is sufficient credible evidence to support the determination, and defers to the trial court's findings, given that court's opportunity to observe the testimony. Id. at 229-230.

The trial court was presented with more than enough "sufficient credible evidence" to support the determination. Id.

As to the carjacking plea, the defendant relies on the Jenkins case which is factually distinct from the facts elicited in defendant's guilty plea. State v. Jenkins, 321 N.J.Super. 124 (App. Div. 1999). There, the victim was approached as he was standing at a gravesite in a cemetery waiting for a friend. Id. at 126. The defendant, while armed with a handgun, demanded his wallet, then his keys, which the victim complied with and then told his assailant where the vehicle was parked, at the cemetery gate. Id. at 126-127. The court there, examined prior cases raising the same issue, and distinguished these facts, finding "we are utterly unable—as the jury would have been to—to conclude that there was a proximity of any sort between" the victim and his car. Id. at 131. The facts elicited at trial did not lend the jury to an understanding of the layout of the cemetery, and noted that "visitors

are often forced to park some distance from a gravesite." Id. The court there addressed subsection (2) of the carjacking statute and noted that "the State must present evidence on the issue of proximity to prove that the victim was either an 'occupant or in control of' the vehicle." Id. Further,

> The victim's proximity to the vehicle is relevant in several regards. First, it clearly bears upon the victim's capacity to control the vehicle, either in terms of his own ability to operate it or to bar entry by others. It is relevant as well to establish that the defendant's actions exposed the victim to a particular risk of harm beyond mere loss of the vehicle. Id.

The facts in the case at bar align more with the Garretson case. State v. Garretson, 313 N.J.Super. 348, 352 (App. Div. 1998). There, the defendant was convicted of subsection 2 of the carjacking statute, after the jury heard that defendant jumped in the victim's car, which was left unlocked and running in a convenience store parking lot, with the owner's elderly mother in the front seat of the vehicle. Id. The Jenkins court examined precedent, and drew the distinction in the facts surrounding what happened in the cemetery, noting:

> In Williams, Garretson, and Matarama, the victim was either in close proximity to the automobile or within it. While in Matarama the victim was across the street from the car, she had just walked away from it when she was assaulted. Further, the vehicle was the expressed object of her attackers. Jenkins, at 131.

The Williams court noted:

> Under the statute, the use of force or the threat of force is deemed to be 'in the course of committing an unlawful taking of a motor vehicle' if it occurs during an attempt to commit the unlawful taking . . . or during an immediate flight after the attempt or commission.' N.J.S.A. 2C:15-2. Whether the occupant or person in possession or control over the automobile is actually situated within the structure of the vehicle when force is employed or threatened is irrelevant under this statutory language. State v. Williams, 289 N.J.Super. 611, 616 (App. Div. 1996).

Here, the proximity is clear, in that the defendant admitted that the victim's car was unlocked, running, and most importantly, after he entered the car, the victim came up to try and stop him from stealing the car by grabbing the door handle, and he used force to get away from her. 1T48:1-25- 1T49:1-20. After the defendant began driving, he realized that there were three children in the backseat of the car. 1T50:2-9. It is abundantly clear from facts elicited that the victim never relinquished control of her vehicle. She stepped away from it for a short period of time, leaving it running with her children inside, and by the time the defendant entered the car, but before he could leave- she was back at her car, physically trying to prevent his escape. This clearly shows the victim was located in close proximity to her vehicle.

Certainly, defendant's actions ignoring the victim's attempts to make him stop, amount to putting the victim in fear of immediate bodily injury while she is in control of her vehicle. The court, in accepting the factual basis is not left with the question of distance- or proximity between the victim and the vehicle, as in Jenkins, where they found constructive possession to be insufficient. Jenkins, at 131. Rather,

it is abundantly clear that the victim exited the vehicle for a short period of time, but never relinquished control of it at the time that the defendant saw his opportunity.

As to the kidnapping count(s), just because the defendant indicates that he does not notice the three children in the backseat until he began driving, does not absolve him of the elements of kidnapping. 1T50:17-25- 1T51:1-10. There is no such requirement, just that he: "unlawfully removes another from . . . or a substantial distance from the vicinity where he is found . . . (1) to facilitate commission of any crime or flight thereafter." N.J.S.A. 2C:13-1. The defendant's criminal objective must have been purposeful - that he complete the act of carjacking, or terrorize the victim, and in so doing, removed them a substantial distance from where he found them. He indicated that the distance was approximately a mile, thus a substantial distance. 1T50:24-25 – 1T51:1.

Therefore, the record contained sufficient evidence of the defendant's guilt of each element of each charge pled to, and this appeal should be denied.

POINT III:
THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner argues for a reversal, or in the alternative, and evidentiary hearing based on his claim that counsel was ineffective during his plea colloquy, and thereafter during "PCR 1." Petitioner cannot make a prima facie case warranting

an evidentiary hearing, and counsel was not ineffective, therefore, this appeal should be denied.

To establish a prima facie claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable likelihood that his claim will meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 51 (1987). (See State v. Preciose, 129 N.J. 451, 463 (1992)). Under the Strickland test, the defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Preciose, 129 N.J. at 459.

The proper inquiry for the first prong is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 668. Prevailing norms of the practice of law should be used as a guidepost. Id. The petition "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. The court must then decide in light of the particular circumstances of the case whether the acts or omissions identified by the defendant "were outside the wide range of professionally competent assistance." Id. In rendering its

decision, the court should apply the strong presumption that counsel has rendered adequate assistance. Id.

For a defendant to show that they received ineffective assistance of counsel during a guilty plea, they must show that counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases" and that there is a "reasonable probability that, but for counsel's errors [the defendant] would not have pled guilty and would have insisted on going to trial." State v. Nunez-Valdez, 200 N.J. 129, 139, 975 A.2d 418 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457, 645 A.2d 734 (1994)).

The second prong of Strickland requires that prejudice be proven by the defendant; it is not presumed. State v. Fritz, 105 N.J. at 52. "A petitioner alleging [ineffective assistance of counsel] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Ibid. (quoting Strickland, 466 U.S. at 694). A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." Ibid. Purely speculative deficiencies in representation are insufficient to support a claim of ineffective assistance to counsel. Ibid. Thus, in order to be entitled to an evidentiary hearing, a defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154 at 170,

cert. denied 162 N.J. 199 (App. Div. 1999).

Instead, the defendant must allege facts sufficient to demonstrate counsel's alleged substandard performance. Ibid. In reviewing this claim, counsel's performance must be evaluated from his or her perspective at the time of the error, and "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, at 689; Kimmelman v. Morrison, 477 U.S. 365, 381 (1986). "A [reviewing] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

The defendant, in his attempt to argue a direct appeal disguised as a second post conviction relief application makes bald assertions that his counsel was ineffective because his factual basis was defective. The factual basis was sufficiently credible, the defendant was fully involved in his plea negotiations, arguing for the lowest number he could get, and eventually pled to eighteen years. 1T3711-25. The sentencing court shaved two years, and sentenced him to sixteen years. Da34. He does not indicate he pled to something that he was not guilty of, he just baldly asserts that the factual base provided was insufficient.

This does not equate to a prima facie case warranting an evidentiary hearing, as petitioner received effective assistance of plea counsel.

As discussed at length above, the defendant has failed to satisfy the first prong of the Strickland/Fritz test because the defendant has not shown that trial counsel was deficient in any way. "Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant." State v. Morrison, 215 N.J.Super. 540, 549 (1987) (citing Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). It is not ineffective assistance of post conviction relief counsel for failure to raise meritless claims. State v. Worlock, 117 N.J. 596, 625, 569 A.2d 1314 (1990). Therefore, "PCR 1" counsel was ineffective.

CONCLUSION

For the above-stated reasons, the State respectfully requests that this Court deny the appeal of the petitioner's denial of his second post conviction relief application.

Respectfully submitted,
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